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No. 390

Supreme Court of the United States

OCTOBER TERM, 1959

EDWIN T. WHITE, *Petitioner*,

vs.

SEATTLE LOCAL UNION NO. 81, AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, a voluntary association; and CHARLES SANVIDGE and JANE DOE SANVIDGE, his wife, and GEORGE J. ARNOLD and JANE DOE ARNOLD, his wife, *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

and

BRIEF IN SUPPORT OF PETITION

JOHN J. KENNETT
Attorney for Petitioner

Of Counsel
JOSEPH D. HOLMES
901 Fourth & Pike Building
Seattle 1, Washington.

THE ARGUS PRESS, SEATTLE

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JOSEPH D. HOLMES
601 Fourth & Pike Building
Seattle 1, Washington.

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Supreme Court of the United States

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No. .....

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON
and
BRIEF IN SUPPORT OF PETITION

To the Honorable, the Supreme Court of the United States:

Edwin T. White, petitioner herein, prays that a Writ of Certiorari be issued to review the judgment of the Supreme Court of the State of Washington, reversing the judgment of the Superior Court of the State of Washington, King County, which had awarded to the petitioner, judgment in the sum of $8,472.84 and costs for being wrongfully deposed from his office and em-

ployment as recording secretary and assistant business agent of the respondent union, Seattle Local 81, Amalgamated Meat Cutters and Butcher Workmen of North America, *et al.*, in violation of his right of due process guaranteed him by the Constitution of the United States.

JURISDICTION

The jurisdiction of this court is involved under 28 U.S.C. Section 1257 (3), since rights, privileges and immunities specially set up and claimed under the constitutions of the United States and the State of Washington have been denied.

On April 2, 1959 the Washington State Supreme Court entered an opinion reversing the judgment of the King County Superior Court which had awarded judgment to the petitioner (Tr. 1) (see Appendix A, *infra*, p. 17); timely petition for rehearing was filed on April 29, 1959 (Tr. 4); on June 23, 1959, the petition was denied (Tr. 29) (Appendix B, *infra*, p. 20).

CITATIONS TO OPINIONS BELOW

The written memorandum opinion of the Superior Court for King County, Washington, is unreported but is included in the record filed herewith (St. 18). The opinion of the Supreme Court of Washington is reported at 153 Wash. Dec. 753 (1959). The order denying petition for rehearing is reported in 154 Wash. Dec. 539; both are included in the certified transcript.

CONSTITUTIONAL PROVISIONS INVOLVED

1. United States Constitution, XIV amendment:

> "No state shall make or enforce any law which shall abridge the privileges and immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

2. United States Constitution, V amendment:

> "'No person shall be deprived of life, liberty or property without due process of law; . . ."

Article I, Section 3, Washington State Constitution, *Personal Rights*:

> "No person shall be deprived of life, liberty or property without due process of law."

Article IV, Section 9, Washington State Constitution, Removal of Judges, Attorney General, etc.:

> ". . . but no removal shall be made unless the officer complained of shall have been served with a copy with the charges against him as ground for removal, and shall have an opportunity of being heard in his defense."

The provisions of the Washington State Constitution above set forth came into being because of the provisions of Section 4 of the Enabling Act, by which the Territory of Washington became the State of Washington. It required Washington State to adopt a State Constitution which would "not be repugnant to the constitution of the United States and the principals of the Declaration of Independence."

QUESTIONS PRESENTED

1. Does the mere administrative declaration of a county health officer, made without a hearing of any kind, automatically deprive a citizen of his right to hold office and a paid job in a union?

2. Does the declaration of a union through its officers that because of an administrative declaration of a public health officer that an employee and officer is under quarantine, automatically deprive him of his office and job although the constitution and by-laws of the said union provide certain procedures for removal of such an officer and employee?

The court below (Washington Supreme Court) answered these questions in the affirmative and stated as above set out:

> "The quarantine of the respondent was as conclusive upon the question of his taking office or performing the duties thereof as his death, incarceration, or deportation would have been. The vacancy was thus an inescapable fact due to his enforced absence which was merely recognized not created by appellant."

SHORT SUMMARY AND SHORT STATEMENT OF MATTERS INVOLVED

This case was started as a simple action to recover from the defendants, the union and its officers, the amount due the plaintiff White, in wages during a period in which he was illegally, without notice, hearing, or trial, as provided in the union constitution, deprived of his employment and office of recording sec-

retary and assistant business agent in the defendant local union.

The complaint alleged that the defendants did so by means of illegally declaring his office vacant, illegally electing one of the defendants his successor, and for the period February 2, 1954 to August 14, 1954, preventing him from holding employment and denying him the wages due him during that time in the sum of $4,060.00.

The complaint further alleged that the defendants intentionally deprived him of these wages and under R.C.W. 49.52.070 and R.C.W. 49.52.050 (Wash. statutes) he was entitled to double the amount so withheld.

The defendant Local 81 and other defendants answered by admitting certain things in the complaint and denying others but offered no affirmative defense.

The union's theory was to prove that although the petitioner was legally elected and entitled to have the position to which he was elected, it was within its rights in disregarding the procedures set out in its constitution and by-laws in depriving him of his office because it was claimed he had tuberculosis.

At the trial in the lower court the defendant offered evidence to the effect that the King County public health officer had quarantined the petitioner, White, and he being under quarantine, could not perform his duties and therefore in spite of the constitution and by-law provisions of the union, and contrary thereto, declared his office vacant and proceeded to elect a suc-

cessor. Incidentally, the health officer quarantined him without a hearing of any kind.

While there was considerable evidence controverting the claim that the petitioner was actively infected with tuberculosis as the health officer had administratively said, as he was under quarantine the union officers administratively and without any semblance of a hearing or investigation as provided in the constitution, declared his office vacant.

He was never allowed to show that he was able, because of the health officer's administrative finding, as he was deprived of his office forthwith. However, his testimony was that he could have so performed. Actually the evidence shows a medical discharge from the supervisor of the hospital who was under the direction of the health officer who declared the quarantine.

The lower court found that he was illegally deprived of a job and that the action of the union and the defendants in so deposing him was intentional, and awarded double the amount of his wages in judgment against the union and its officers.

The Supreme Court of the State of Washington in setting aside the judgment of the Superior Court said in part:

> "The quarantine of the respondent was as conclusive upon the question of his taking the office or performing the duties thereof as his death, incarceration, or deportation would have been. The vacancy was thus an inescapable fact due to his enforced absence, which was merely recognized—not created—by the appellant."

REASONS FOR GRANTING WRIT

1. The judgment of the court below was based upon an erroneous conception of the rights of citizens under the United States and Washington State constitutions.

The court below held that the administrative act of the King County public health officer, without hearing of any kind, automatically deprived the petitioner, White, of his job and office with the respondent. It held, as pointed out in petitioner's brief in his petition for rehearing before the Washington State Court (Tr. 4) that,

> "If the public health officer of Thurston county, on his own determination, and without a hearing or any formal proceedings, decided that one of the Justices of the Supreme Court had contagious tuberculosis he could by a pronouncement deprive the Justice of his office and make it possible for the immediate appointment of a successor who would have legal status in that position."

The court below deprived the petitioner of a property right without due process in violation of the above quoted constitutional provisions.

2. The judgment of the court below approved the act of the defendant union in depriving a union officer of his right to hold office without a hearing although one was provided for in its constitution. It thereby approved the union's action in depriving petitioner of a property right without due process of law. The provisions in the United States and Washington State constitutions are practically identical as to the provisions involved here (*supra*).

3. The judgment of the Supreme Court of the State of Washington was entered on June 23, 1959, the order denying petition for rehearing having been filed June 23, 1959. The petition is presented prior to September 21st, 1959.

4. The federal question was timely raised and passed upon. The original complaint itself in King County Superior Court showed by its allegations that the violation of constitutional rights were complained of. The judgment of the state Supreme Court (Tr. 30) reversing the lower court's order and judgment in favor of the petitioner generally denies petitioner's claim of a constitutional right and specifically denies it in approving the respondent's deprival of the petitioner of a property right without due process.

This constitutional question was specifically raised in this petitioner's petition to the Washington State Supreme Court for a rehearing. In that petition also (Reply to Answer to Petition for a Rehearing (Tr. 11)) the petitioner referred to the above mentioned articles in the United States and Washington constitution concerning personal rights.

5. The judgment of which review is sought is a final judgment of the Supreme Court of Washington.

ARGUMENT IN SUPPORT OF PETITION

A question might arise at first glance as to whether a job or an office in a union is a property right which the constitutions contemplate. Our Washington courts have decided that if was such a property right so that the court below was bound by that interpretation.

Quoting from the Washington case, *Washington Local etc. v. International etc.*, 33 Wn.(2d) 1, 203 P. (2d) 1019 at p. 1058.

> "Numerous decisions could be cited from our own reports as to the necessity of complying with due process or the law of the land in dealing with property rights. In the syllabus to *Jones v. Leslie*, 61 Wash. 107, 112 Pac. 81, 48 L.R.A. (N.S.) 893, Ann. Cas. 1912B, 1158, it is said: 'The right of employment in a laboring man is property'."
>
> "In the body of the opinion which was prepared by then Chief Justice R. O. Dunbar, we find the following:
>
> "'This presents a case here which is purely a question of law. It would be well to remember, in the beginning, that it is fundamental that a man has a right to be protected in his property. This was the doctrine of the common law; is, and always has been, the law in every civilized nation. It is, of necessity, one of the fundamental principles of government, the protection of property being largely one of the objects of governments. For the protection of life, liberty, and property, men have yielded up their natural rights and established governments. Is, then, the right of employment in a laboring man property? That it is, we think cannot be questioned'."

Also see *Northwest National Insurance Co. v. Fishback*, 130 Wash. 490, 228 Pac. 516, at p. 517:

> "As to expulsions without notice, see *State ex rel. Rowland v. Seattle Baseball Ass'n.*, 61 Wash. 79, 111 Pac. 1055, at p. 1057.
>
> "In *Furniture Workers' Union v. United Brotherhood of Carpenters & Joiners of America*,

6 Wn.(2d) 654, 108 P.(2d) 651, at p. 656, where the Brotherhood suspended the plaintiff local union without notice of charges and without trial, the court held the suspension void, saying, in part:

"'It is the settled law that such arbitrary action is void. From the multitude of cases which could be cited, we select only those in which this very appellant or its officers were involved. *Cox v. United Brotherhood of Carpenters, etc., supra* (190 Wash. 511, 69 P.(2d) 148); *Reichart v. United Brotherhood of Carpenters, etc.*, 14 N.J. Misc. 106, 183 Atl. 728; *Swaine v. Miller*, 72 Mo. App. 446; *Neal v. Hutcheson*, 160 N.Y. Supp. 1077.'"

In 21 A.L.R.(2d) 1406 it is said:

"While union trial need not be conducted with the technical observances of forms of legal procedure, the courts will ascertain whether those rudimentary rights, ordinarily comprised in the concept of due process which are essential to any fair trial, have been observed; whether for example a union's power to expel a member has been exercised in accordance with the requirements of union laws, etc."

In 21 A.L.R.(2d) 1410:

"The law insures to every member of a union a fair trial; not only in accordance with the constitution and by-laws of the union, but also with the demands of fair play. It seems settled that, where an association's rules are silent with respect to the matter, the law implies or imposes the fundamental requirements of due process, such as notice and hearing and insists upon some form of judicial proceedings being employed before a

member be expelled or suspended. In this situation the only question with which the court is concerned is whether the procedure resorted to was an honest, fair and reasonable one."

The same text (21 A.L.R.(2d)) on page 1408 says:

"The principles of natural justice can only mean in this connection the principles of fair play so deeply rooted in the minds of modern Englishmen that a provision for an inquiry necessarily imports that the accused should be given his chance of defense and explanation." (*Maclean v. Workers' Union* (Eng.) (1929) 1 Ch 602)

Again on page 1413 of the same text,

". . . it is well settled that the courts have power to construe the provisions contained in a union's constitution or by-laws, for the purpose of determining whether, in expelling or suspending a member, these provisions have been violated so as to justify judicial interference. **The inclination of** the courts to sustain a union's interpretation of its by-laws and to overlook trifling informalities in its proceedings cannot be extended to put the power of the courts at the mercy of the association."

In 21 A.L.R.(2d) 1421 it is stated:

"Where the expulsion or suspension of a member of a labor union is invalid because of substantial defects in the proceedings, the courts will not deny relief on the ground that the expelled member was in fact guilty and hence barred from relief by the equitable maxim that one who commits an inequity shall not have equity. This rule applies particularly where the proceedings are invalid for lack of a hearing. The court will not un-

dertake to determine whether the charge upon which a member was expelled justifies the decision of the union, since it would be improper to substitute a hearing in the courts for the hearing that the member is entitled to have within the union to which it belongs."

Again on page 1425:

> "Lack of an impartial hearing vitiates the proceedings. *Campbell v. Johnson* (1909, CA 9th Wash.) 167 F. 102."

There was no charge made, no notice given, no hearing held, so that following the rule of the Washington State Courts and the above generally recognized principles, the act of the union in deposing the petitioner was an act to deprive him of a property right which is guaranteed him in the constitution of the United States and of the State of Washington.

There was no question raised in the lower court about this matter of a hearing. That is admitted. The Washington State Supreme Court found that it was not necessary to have such a hearing and it said,

> ". . . but we are not concerned with the vacancy so created. Instead the vacancy in question was attributable solely to the respondent's health." (Tr. 2)

Obviously the Washington Supreme Court in its opinion relied upon the Washington State constitutional provision for police power in which quarantine power is given to local health officers. This article provides:

> "Article XX, Washington State Constitution

there shall be established by law a state board of health . . . with such powers as the legislature may direct."

This article like all police power articles and statutes is controlled and limited by the general provisions in the constitution of the State of Washington as indicated in Washington State case *Yakima v. Gorham*, 200 Wash. 564, 94 P.(2d) 180:

> "That the police power conferred by this section (Art. XX) can be exercised only in conformity with the general laws and the public policy of the state as declared by the legislature."

The Supreme Court of the State of Washington in the case of *Ex rel. McBride*, 103 Wash. 409, 174 Pac. 973 at p. 975 cites Section 11, Art. 11 of the Washington State Constitution:

> "Any . . . city . . . may make and enforce within its limits all such local police, sanitary, and other regulations as *are not in conflict with the general laws.*"

The question of quarantine was brought into the case for the first time at the trial in the trial court by the defendant union. The petitioner objected to the evidence concerning the quarantine but was overruled and after the defendant had put in a mass of evidence concerning the same the petitioner met it with evidence showing that first, he was discharged as cured and second, he was not infected at the time in question. Obviously the trial court believed either one of these theories.

But now not to lose track of the point involved, even

had the evidence of quarantine been undisputed the quarantine did not itself automatically deprive the respondent of his job. Even the health officer, Doctor Fountain did not attempt to make that ruling.

It should be noted that it has been held in the State of Washington (*Washington Local etc. v. International etc.*, 33 Wn.(2d) 1, 203 P.(2d) 1019, *supra*) that even if the constitution and by-laws of a union provided for dismissal without charges being filed or hearing had it would not be proper to so dismiss him.

It will also be noted that neither in the police power given to a health officer (Washington State Constitution, Article XX) or the penalties for failure to observe his orders, nothing is said about depriving a person of an office or a property right. The only penalty is a jail sentence or a fine (R.C.W. 70.06.070).

The courts of the land have long and carefully watched the "police power" of a state or municipality to protect against infringement upon the basic personal rights of citizens.

The Washington State Supreme Court in this case held "*The quarantine created the vacancy.*" The union accepted that as a basis for declaring petitioner's office vacant and as it presumed it to be legally declared vacant proceeded to elect a successor. But of course this was not proper. As we have pointed out above the quarantine was merely a restriction upon the petitioner's doing certain things, none of which were holding an office in defendant union or a job as assistant business agent, for which the only penalty under Wash-

ington statutes for violating it is a fine or imprisonment. As the trial judge said in his memorandum opinion (Tr. 18):

> "It is true that the union for cause could have proceeded within the framework of its constitution and by-laws, to declare any office vacant, but not in the manner it attempted to in the case of the plaintiff."

CONCLUSION

We have indicated above the reasons why this petition for a Writ of Certiorari should be granted. The judgment is based upon the erroneous interpretation of the provisions of the Washington State and United States Constitutions.

The court has approved the dismissal of the petitioner from his job without a hearing of any kind.

Congress has for several years tried through its investigations and attempts to pass appropriate labor legislation, to prevent racketeers and self-perpetuating labor bosses from doing exactly what was done here. Even the president of the United States has insisted on legislation to prevent these arbitrary practices.

Now we have the decision of a State Supreme Court, which is the law of the State of Washington, placing a stamp of approval upon one of these practices. To say, as it did that quarantine or "incarceration" without a hearing of any kind prevents a person from holding a job or an office, depriving him of a property right, would be to set a dangerous precedent.

Wherefore petitioner prays that his petition be granted and a Writ of Certiorari issue to review the judgment of the court below.

Respectfully submitted,

JOHN J. KENNETT
Attorney for Petitioner.

JOSEPH D. HOLMES
Of Counsel for Petitioner

601 Fourth & Pike Building
Seattle 1, Washington.

APPENDIX A

OPINION OF THE SUPREME COURT OF WASHINGTON, DEPT. 1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

EDWIN T. WHITE, *Respondent*,

v.

SEATTLE LOCAL UNION NO. 81, AMALGAMATED MEAT CUTTERS' AND BUTCHER WORKMEN OF NORTH AMERICA, a voluntary association, *Appellant*,

AMALGAMATED MEAT CUTTERS' AND BUTCHER WORKMEN OF NORTH AMERICA, a voluntary association, *Defendant*, CHARLES SANVIDGE and JANE DOE SANVIDGE, his wife; and GEORGE J. ARNOLD and JANE DOE ARNOLD, his wife, *Appellants*.

No. 34834

Department One

Filed April 2d, 1959.

The plaintiff brought this action against the defendants for damages for depriving him of his job as recording secretary and assistant business agent of the local union. The trial court granted a motion for summary judgment for defendant Amalgamated Meat Cutters' and Butcher Workmen of North America. The remaining defendants appeal from an adverse judgment.

Appellants assign error to the trial court's finding that they declared the office vacant in violation of the union constitution and bylaws. This assignment is well taken.

In January, 1954, the respondent received a majority of the votes cast for the office of recording secretary and assistant business agent of the appellant

union. The term of office was to commence on February 2, 1954. About January 27, 1954, the acting King County health officer placed the respondent in quarantine for the reason that he had active pulmonary tuberculosis. The quarantine was effective as of February 1, 1954, and continued for the period in question. On February 2, 1954, the appellant union's president announced at the regular union meeting that the respondent's office was vacant because he was confined with active tuberculosis.

The trial court felt, according to its memorandum opinion, that the quarantine was in the nature of an affirmative defense, and, since it was not pleaded as such, it could not be considered in reaching a decision. We do not agree.

The complaint alleged that appellants declared the office vacant in violation of the union constitution and bylaws. This was answered by a general denial. It was the trial court's position that the union failed to follow Art. XX of its constitution, which provides the procedure necessary for impeachment or dismissal of an officer or member, and that the declaration of a vacancy in the office was therefore wrongful.

The impeachment or dismissal of an officer, of course, creates a vacancy in the office, but we are not here concerned with a vacancy so created. Instead, the vacancy in question was attributable solely to the respondent's health. The law requires the quarantine of one suffering from active pulmonary tuberculosis. The quarantine of the respondent was as conclusive upon the question of his taking the office or performing the duties thereof as his death, incarceration or deportation would have been. The vacancy was thus an inescapable fact due to his enforced absence, which was merely recognized—not created—by the appellants.

When the union president told the members at the February 2, 1954, meeting the office was vacant, the declaration did not constitute a removal of an officer such as is contemplated under Art XX of the union constitution. It was simply the announcement of an established fact. There is no provision in the union constitution and bylaws for the procedure to be followed in vacancies of this kind other than a provision for election of a replacement. The respondent was not wrongfully removed from office nor damaged by the announcement of the vacancy at a regular meeting.

The judgment is reversed.

MALLERY, J.

We concur:

Weaver, C. J.
Donworth, J.
Ott, J.
Hunter, J.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Clerk's Office
Supreme Court
State of Washington
June 23, 1959
ROBERT HOLSTEIN, Clerk
By ARCHIE B. STEWART, Deputy

EDWIN T. WHITE, *Respondent*,

vs.

SEATTLE LOCAL UNION NO. 81, AMALGAMATED MEAT CUTTERS' AND BUTCHER WORKMEN OF NORTH AMERICA *et al.*, *Appellants*.

No. 34834

ORDER DENYING PETITION FOR REHEARING

The court having considered the respondent's petition for a rehearing herein, the appellants' answer to the petition and the respondent's reply to the answer,

IT IS ORDERED that the petition for rehearing be and it is hereby denied.

Done this 23d day of June, 1959.

By the Court.

FRANK P. WEAVER
Chief Justice

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Supreme Court of the United States

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

L. PERSLEY GILL
Attorney for Respondents

Office and Post Office Address:
520 First Avenue,
Seattle 1, Washington.

THE ARGUS PRESS SEATTLE

No. 34834

Supreme Court of the United States

OCTOBER TERM, 1959

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

L. PRESLEY GILL
Attorney for Respondents.

Office and Post Office Address:
2800 First Avenue,
Seattle 1, Washington.

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Supreme Court of the United States

OCTOBER TERM, 1959

EDWIN T. WHITE, *Petitioner*,

vs.

SEATTLE LOCAL UNION NO. 81, AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, a voluntary association; and CHARLES SANVIDGE and JANE DOE SANVIDGE, his wife, and GEORGE J. ARNOLD and JANE DOE ARNOLD, his wife, *Respondents*.

No. 31831

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

The decision of the Supreme Court of the State of Washington does not on its face show that the court considered the due process clause of the Fourteenth Amendment to the Constitution of the United States and in order for this Court to assert jurisdiction because of the denial by the state court of any title, right, privilege or immunity claimed under such Constitution, it must appear on the record that such title, right, privilege or immunity was "specially set up or claimed" at the proper time and in the proper way. This Brief in Opposition is respectfully addressed to this question and considers the proper criteria for a determination thereof.

I. CHALLENGE TO JURISDICTION TO GRANT THE WRIT

Respondents urge that the petitioner has not complied with the statute, 28 U.S.C. Sec. 1257(3) in that

A. The federal question was not "specially set up or claimed" in the trial court and in the state appellate court. It is assumed that the state appellate court did not consider the federal question, posed for the first time in the petition for rehearing, for the reason that it was not timely raised.

B. The state appellate court had the right to assume that its judgment was adequately supported by a non-federal ground, making it unnecessary to consider the constitutional questions presented by the petition for rehearing.

C. There is no substantial federal question involved. Assuming that the federal question was properly raised, the state appellate judgment conforms to due process.

D. The denial by private parties of notice and hearing does not violate either the Fifth or Fourteenth Amendment to the Constitution of the United States.

II. RE-STATEMENT OF QUESTIONS PRESENTED

Respondents would reframe petitioner's questions with the changes *italicized*:

1. Does the mere administrative declaration of a county health officer, made without a hearing of any kind, automatically deprive a citizen of his right to hold office and a paid job in a union *where the petitioner does not claim that such quarantine was arbitrary, capricious or unreasonable*?

2. Does the declaration of a union through the officers that because of an administrative declaration of a public health officer that an employee and officer is under quarantine, automatically deprive him of his office and job . . . *where* the constitution and by-laws of

said union . . . *is silent on "the procedure to be followed for such vacancies of this kind other than a provision for election of a replacement"?*[1]

Respondents assert that the state appellate court did not answer question "2" as posed by petitioner, and answered the question posed by us in the affirmative. While the *italicized* portion of question "1" was not specifically mentioned, we believe it is necessarily implied. See *State ex rel. Lehman v. Parlow*, 119 Wash. 316, 205 Pac. 420, and *McGuire v. Amyx*, Mo. 297 S.W. 968.

III. THE FEDERAL QUESTION WAS NOT "SPECIALLY SET UP OR CLAIMED IN THE STATE COURTS

A. The State Practice

Washington does not have a statute or rule of court specifying the manner, time or place of raising constitutional questions. The uniform rule is that constitutional questions, whether federal or state, must be raised at least on appeal by specific assignments of error, and many jurisdictions require that they be raised in the trial court as well. 11 Am. Jur. Sec. 125, page 772, and cited cases.

Although Washington courts have never had the occasion to pass on the question, there is *dicta* to the effect that the general rule is follo[illegible]d.[2]

[1] The petitioner unsuccessfully contended in the state appellate court and now contends that the union constitution provided a procedure for this type of vacancy. We have reframed the question by inserting the language used in the state court's opinion (R. 3).

[2] The briefs in the Washington cases do not show that any constitutional questions were raised.

In *Lyon v. Herboth*, 1925, 133 Wash. 15, 233 Pac. 24, the court stated:

> "The constitutionality of the legislation we have been discussing is not raised and consequently not discussed."

In *State ex rel. Rand v. Seattle*, 13 Wn.(2d) 107, 123, 124 P.(2d) 207, the court stated that where the parties have not raised or considered the validity of the ordinance, "... we do not deem it proper herein to determine the constitutional question."

B. The Federal Question Was Only Raised in a Petition for Rehearing

No mention of any constitutional provisions or questions was made in the trial court. The complaint was a simple action to recover wages (petition pp. 4, 5; complaint, R. 22-25). The answer was a general denial (petition p. 5; R. 26-27). Petitioner does not contend that the question was raised in the state appellate court except in the petition for rehearing (petition p. 8).[3] In *Bailey v. Anderson*, 326 U.S. 203, 206-207, the assign-

[3] While the briefs in the state court are not a part of the record, it is noted that the petitioner does not claim that the federal question was raised by an assignment of error, nor does the petitioner assert that the state appellate court refused to pass upon any properly stated assignments of error. The Washington State Supreme Court has a strong rule that it will not pass upon questions not specifically raised by Assignments of Error.

Volume O, Revised Code of Washington, Rules of Court provides:
"Rule 12. Contents and Style of Briefs.

"(1) (f) Each error relied on shall be clearly pointed out and discussed under appropriately designated headings . . ."
"Rule 13. Errors Considered.

"No alleged error of the superior court will be considered by this court unless the same be definitely pointed out in the 'assignments of error' in appellant's brief."

ments of error did not raise any constitutional question and this Court assumed that the silence of the state appellate court was due to this procedural deficiency.

C. The Practice of This Court

Once the highest state court has rendered a judgment that is final in all respects, the filing of a timely petition for rehearing merely defers the running of the 90-day period for petitioning certiorari in this Court. The period starts running on the disposition of a petition for rehearing rather than on the elapse of the period allowed for its filing. A decision on the petition for hearing is not the final judgment for the purpose of raising constitutional questions.

Chicago, G.W. R. Co. v. Basham, 249 U.S. 164;

Market Street R. Co. v. Railroad Commission, 324 U.S. 548, 551-552.

While no precise method of raising the federal question is required, yet particularity must be present. As stated in *Oxley Stave Co. v. Butler County*, 166 U.S. 648, 655:

> "The jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a federal right."

Herndon v. Georgia, 295 U.S. 441;

Harding v. Illinois, 196 U.S. 78, 88;

Capital City Dairy Co. v. Ohio, 183 U.S. 238, 248;

Oxley Stave Co. v. Butler County, 166 U.S. 648;

Bowe v. Scott, 233 U.S. 658, 664-5.

Compare:

Braniff Airways v. Nebraska State Board, 347 U.S. 590.

D. This Court Holds That Raising Federal Questions in a Petition for Rehearing Is Not Timely

While this Court states that it will follow state practice,[4] this Court has the firm rule that raising of federal constitutional questions in a petition for rehearing which the state appellate denies without opinion is not timely. The reason appears to be that the parties are entitled to argue the question at the state level, and that the federal judiciary will not intervene in state proceedings unless the state court has clearly violated the rights of United States citizens.[5]

The rule is thus concisely stated.

In *Rooker v. Fidelity Trust Co.*, 261 U.S. 114, 117:

> "In their assignments of error on the appeal to that (state) court the plaintiffs said nothing about the statute or its validity; nor was there any rev-

[4] To the effect are:
Stembridge v. Georgia, 343 U.S. 541, 547;
Central Union Co. v. Edwardsville, 269 U.S. 190, 194-195;
Penn. R. Co. v. Illinois Brick Co., 297 U.S. 447, 462-463;
Parker v. Illinois, 333 U.S. 571, 574-575;
John v. Paullin, 231 U.S. 583, 585, 58 L.Ed. 381, 34 S.Ct. 178.

[5] To this effect are:
Radio Station WOW v. Johnson, 326 U.S. 120, 128;
American Surety Co. v. Baldwin, 287 U.S. 156;
Forbes v. State Council, 216 U.S. 396;
Simmerman v. Nebraska, 416 U.S. 54;
Herndon v. Georgia, 295 U.S. 441, 443.

erence to either in the court's opinion. All that appears is that after the judgment of affirmance the plaintiffs sought to raise the question by a petition for rehearing which was denied without opinion. But that effort came too late."

In *Tidal Oil Co v. Flanagan*, 263 U.S. 417, 455:

"This court has always held it a prerequisite to the consideration here of a federal question in a case coming from a state court that the question should have been raised in that court before decision, or that it should have been actually entertained and considered upon petition to rehear. A mere denial of the petition by the state court without opinion, is not enough."

In *Godchaux v. Estopinal*, 251 U.S. 179, 181:

"The settled rule is that in order to give us jurisdiction to review the judgment of a state court upon writ of error the essential federal question must have been especially set up there at the proper time and in the proper manner; and further, that if first presented in a petition for rehearing, it comes too late unless the court actually entertains the petition and passes upon the point."

In *Texas, etc. R'y. Co. v. Southern Pacific Co.*, 137 U.S. 48, 53-54:

"It is contended . . . that the decision . . . constituted a denial of a right or privilege conferred by a statute of the United States; and also, that . . . such decision was an interference with the freedom of interstate commerce, within the prohibition of the commerce clause of the Constitution of the United States. But it does not appear that either of these propositions was presented to the trial court in any way, or advanced in the (state) Su-

preme Court, until urged in a petition for a rehearing. The title, right, privilege or immunity was not specially set up or claimed at the proper time and in the proper way. It is true that under the law of Louisiana a judgment of the Supreme Court does not become final until after six judicial days from the rendering of the judgment have elapsed, within which time a dissatisfied party may apply for a rehearing of the cause, but it does not follow that new grounds for decision will be allowed to be presented, or will be considered on such application, and the general rule is otherwise . . . and while the court is required to state the reasons of its judgments, it is not obliged to give reasons for refusing a new hearing . . ."

In *Locher v. Schroeder*, 149 U.S. 580, 585:

> "It is also well settled by decisions of this court that the attempt to raise for the first time a federal question, in a petition for rehearing, after judgment comes too late."

In *Herndon v. Georgia*, 295 U.S. 441, 443:

> "The long-established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it."

IV. THE STATE JUDGMENT IS ADEQUATELY SUPPORTED ON A NON-FEDERAL GROUND

Assuming that the federal question was properly presented in the state courts, the silence of the state appellate court to pass upon it does not give this Court jurisdiction if its judgment can be sustained on a non

federal ground.[6] In *Stembridge v. Georgia*, 343 U.S. 541, 547, it was held that where it appears that the state court judgment might have rested on a non-federal ground, this Court will not take jurisdiction.

It has also been decided that even if the state court incorrectly decides the federal question, yet if it states an adequate non-federal ground, this Court considers that the federal question was not necessary to a determination of the case. It was held in *Lynch v. New York ex rel. Pierson*, 293 U.S. 52, 54-55, 79 L.Ed. 191, 193, that

> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause; and that it was actually decided or that the judgment as rendered could not have been given without deciding it."

Here the state court decided that where the union constitution is silent, an elected officer who is quarantined for tuberculosis by a health officer and does not serve in that capacity, there is a vacancy as a matter of law. The union can proceed to fill the vacancy accord-

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[6] It is the established rule in Washington that the court will not pass upon constitutional questions if it is possible to decide the issues on non-constitutional grounds.
State v. Grabinski, 33 Wn.(2d) 603, 612, 206 P.(2d) 1022;
State v. Bowen & Co., 86 Wash. 23, 149 Pac. 390;
State v. Charrier, 151 Wash. 651, 276 Pac. 878;
Gengler v. King County, 12 Wn.(2d) 227, 121 P.(2d) 346;
Batchelor v. Madison Park Corp., 25 Wn.(2d) 907, 172 P.(2d) 168.

ing to the procedure prescribed for vacancies generally. This is a non-federal ground which supports the decision.

Petitioner urges that this holding violates the due process clause of the Fourteenth Amendment. It appears that petitioner is relying on the procedural aspects.[7]

V. THERE IS NO SUBSTANTIAL FEDERAL QUESTION INVOLVED

The judgment of the state court conforms to due process. The Washington Constitution provides:

"ARTICLE XX

"Sec. 1. Board of Health and Bureau of Vital Statistics.

"There shall be established by law a state board of health and a bureau of vital statistics in connection therewith, with such powers as the legislature may direct."

Pursuant thereto, the legislature enacted:

"RCW 70.06.030 Powers and Duties of Health Officers.

". . . It shall be the duty of all health officers upon appearance of any dangerous contagious or in-

[7] The petition for rehearing (R. 4-7) states:

"A public health officer has a right and duty to enforce quarantines, and could properly prevent the respondent from attending his duties as an assistant business agent of the union here while under quarantine, but he has no legal right or authority to declare the respondent's office in the union vacant."

The petition herein states (pp. 6-7) that:

"Incidentally, the health officer quarantined him without a hearing of any kind. . . . The court below held that the administrative act of the King County public health officer, without hearing of any kind, automatically deprived the petitioner . . . of his job . . ."

fections diseases within their jurisdiction, immediately to investigate all circumstances concerning such diseases, and to make a full report thereof as required above and at all times promptly to take such measures for the prevention, suppression and control of such diseases as may be needful and proper. Every health officer shall have the power to remove to and restrain in a pest house or isolation hospital, or to quarantine or isolate any person sick with any dangerous contagious or infectious disease until such sick person shall have thoroughly recovered or been disinfected . . .";

"RCW 70.06.050 Who Determines Character of a Disease.

"In case of a question arising as to whether or not any person is affected or is sick with a dangerous, contagious or infectious disease, the opinion of the health officer shall prevail until the state board of health is notified or any member or physician he may appoint to examine such case, shall be final."

"RCW 70.06.070 Penalties for Breaking Quarantine." (omitted)

"RCW 70.06.070 Penalties." (omitted)

"RCW 70.06.090 Regulations.

"The state board of health can adopt regulations for prevention, suppression and control . . . maintain isolation hospitals and quarantine . . ."

These provisions are implemented in the Regulations of the State Board of Health.[3]

[3]The Regulations state in Sec. 7, page 4, that tuberculosis is covered by the regulations; Sec. 8, p. 6 provides for isolation and quarantine; "C" specifies the procedure for quarantine; and "D" provides for termination; Sec. 10, page 10 restricts travel.

The federal due process clause appears in the Washington State Constitution in substantially the same language:

"Article 1, Sec. 3. *Personal Rights*

"No person shall be deprived of life, liberty or property without due process of law."

The constitutionality of this act as well as the delegation of the function of determining the existence of the disease and the need for quarantine has been upheld by the Washington State Supreme Court and by this Court by following the same reasoning.

The courts uniformly hold that the health laws are pursuant to the police power, and that the health regulations are pursuant to the legislative function and do not constitute an improper delegation of legislative authority. They hold that the functions of defining diseases, quarantine and determining the facts are legislative and not subject to judicial review in the absence of arbitrary, capricious or unreasonable conduct.

State ex rel. McBride v. Superior Court, 103 Wash. 409, 174 Pac 973;

Board of Health v. Union Common Pleas (N.H.) 85 Atl. 257;

Davison v. Walla Walla, 52 Wash. 453, 100 Pac. 981;

State v. Somerville, 67 Wash. 638, 122 Pac. 324;

State ex rel. Puyallup v. Superior Court, 50 Wash. 650, 97 Pac. 778;

State ex rel. Aberdeen v. Superior Court, 44 Wash. 526, 87 Pac. 818.

These are general rules:

Am. Jur. Health Sec. 5 and 15;

39 C.J.S. Sec. 41, p. 864;

8 A.L.R. 836; 24 A.L.R. 798; 54 A.L.R. 644.

In *Zucht v. King*, 260 U.S. 174, 177, 67 L.Ed. 194, 198, this Court considered an ordinance authorized by state law which delegated to health officers the determination and administration of vaccination for school children, and petitioner's daughter was denied admission to school for non-compliance. The federal questions were properly presented, but this Court held that by a long line of decisions such laws and such delegation of authority to be constitutional, and hence, no substantial federal question was presented.

The petitioner does not claim improper quarantine. A quarantine is proper, and the administrative appeal remedies are conclusive upon the courts in the absence of allegations and a showing that the quarantine was arbitrary, capricious or unreasonable. In *State ex rel. Lehman v. Partlow*, 119 Wash. 316; 205 Pac. 420, the state court upheld this statute as being binding on the school board and upon the courts in the absence of allegations that the health orders were arbitrary, capricious or unreasonable. This appears to be the general rule:

McGuire v. Amyx, Mo., 297 S.W. 968;

39 C.J.S. Sec. 41, page 864;

54 A.L.R. 644.

The opinion of the state court (R. 1-3) stated:

> "The quarantine of the respondent was as conclusive upon the question of his taking office or performing the duties thereof as his death, incarceration or deportation would have been."

This Court has upheld administrative appeal remedies as being conclusive under the due process clause in

Nishimura Ekiu v. United States, 142 U.S. 651, 660, 664;

United States v. Ju Toy, 198 U.S. 253, 263.

This Court holds that substantial federal questions must be presented and they must not be so devoid of merit as to be frivolous.

Zucht v. King, 260 U.S. 174, 177, 67 L.Ed. 194, 198;

Palmer Oil Corp. v. Amerada Corp., 343 U.S. 390, 393, 96 L.Ed. 1022, 1026.

VI. NOTICE AND HEARING NOT REQUIRED UNDER DUE PROCESS CLAUSE

The due process clause has both procedural and substantive law aspects. In the former it encompasses notice and hearing. However, the Fourteenth Amendment is directed at actions of the state and its instrumentalities, including the state courts, while the Fifth Amendment is directed at actions of the federal legislative, executive and administrative agencies. Neither amendment is applicable to voluntary unincorporated organizations such as the respondent-labor union.

The cases cited by petitioner as requiring notice and hearing by labor unions are accepted as laying down

the law of the land, but such right is not grounded in the federal constitution. None of the cases cited by the petitioner, nor any other authorities so hold.

The Fifth and Fourteenth Amendments only refer to governmental action and not to action by individuals.

Corrigan v. Buckley, 271 U.S. 323, 70 L.Ed. 969, 46 S.Ct. 521;

Grovey v. Townsend, 295 U.S. 45, 55 S.Ct. 622, 78 L.Ed. 1292;

Nat. Fed. of Ry. Workers v. National Mediation Board, 71 App. DC 266, 110 F.2d 529, 537;

Teague v. Bro. of Loco. Firemen & Enginemen, 6 Cir., 127 F.2d 53;

Mason v. Hitchcock, 1 Cir., 108 F.2d 134;

Lundberg v. Chi. G.W. Ry. Co., DC Mo., 76 F.Supp. 61;

Int. Union of M.M. & S.W. v. Tennessee Copper Co., DC, Tenn., 31 F.Supp. 1015

The due process clause is not applicable to a labor union which denies notice and hearing to a member who is being disciplined.

Jenkins v. Local Union No. 6313, C.W.A., Mo., 1954, 263 S.W.(2d) 337.

VII. CONCLUSION

This Court does not have jurisdiction to hear this case, and the Writ should not be issued.

The federal question was posed in the state appellate

court after judgment in a petition for rehearing which the court denied without an opinion. It must be assumed that the state court refused to consider the federal question because of the procedural deficiency. These respondents therefore have not had the opportunity of having a hearing at the state level on the federal question.

Assuming that the state appellate court considered the federal question and decided it erroneously, this Court should nevertheless decline jurisdiction because the state judgment is adequately supported on a non-federal ground. In fact, the decisions of this Court indicate that this Court would have reached the same result.

There has therefore been no denial of due process.

It also appears that there could be no federal question involved even if the issue had been raised, that is, that notice and hearing was required of the respondent labor union, because the requirement for notice and hearing is not grounded on the constitution.

The petition should be denied.

Respectfully submitted.

L. Pressley Gill

Attorney for Respondents

Office and Post Office Address:
2800 First Avenue,
Seattle 1, Washington.